Supreme Court of the United

In re

IN THE MATTER

OF

THE PETITION OF THE CHRISTENSEN REGISTERING COMPANY PRAYING FOR A WRIT OF MANDAMUS.

Brief for Christensen Registering Company in Support its Petition for Mandamus.

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Supreme Court of the United States.

Ex parte

IN THE MATTER

OF

The Petition of the CHRISTENSEN ENGINEERING COMPANY, praying for a writ of mandamus.

Brief for Christensen Engineering Company to Support its Petition for Mandamus.

Petition asks for a mandamus to the Circuit Court of Appeals for the Second Circuit, commanding it to reinstate petitioner's writ of error, to take jurisdiction thereof, and consider and determine the same on its merits.

We believe the merits of said writ of error are not here for review, and the proceedings in the Court below are referred to only to show the *status* of the case, and how the question here arises.

The question arises as follows: The Christensen Engineering Co. being sued in equity for infringement of a patent, a preliminary injunction was issued enjoining it from infringing claim 2 of the patent (see Petition, par. IV. and V.). For an alleged disobedience of the injunction, the Circuit Court fined the petitioner $1,000, $500 of which was ordered to be paid to the

Clerk of the Court, presumably for the use of the Government, and $500 to the complainant in the suit, but not, at least expressly. by way of damages or indemnity, though it may have been so intended (Pet., par. VI.).

The petitioner sued out a writ of error to the Circuit Court of Appeals (Pet., par. VII. and VIII.) After a hearing that Court dismissed the writ, without any consideration of the merits, on the ground that it had no jurisdiction of the writ (Pet., par. IX.), and without either affirming or reversing the order or judgment of the Circuit Court (See Affit. of Counsel, fol. 30 of Petition). The opinion is annexed to the petition and discloses that lack of jurisdiction was the *sole* ground of the dismissal.

The Circuit Court of Appeals was, in its own words, "constrained" to dismiss the writ under the authority of *In re Debbs*, 158 U. S., 564, although it had previously taken jurisdiction of a similar writ under the authority of *New Orleans vs. Steamship Co.*, 20 Wall., 387, and yet *In re Debbs* does not purport to overrule *New Orleans vs. Steamship Co.*, nor even refers to it, and, as we think, the two cases are consistent.

We may concede that if the Circuit Court's order or judgment fining for contempt was not *final*, but intermediate, and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed. If, however, it was *final*, then the Circuit Court of Appeals should have entertained our writ of error, and that Court substantially so concedes. But under the ruling in *New Orleans vs. Steamship Co.*, as understood by the Circuit Court of Appeals in deciding cases earlier than the one at bar, and by the Supreme Court in later cases, the fining order or judgment, to review which our writ of error is taken, *is* final, because it is not within the class of cases considered in *Worden vs. Searles*, 121 U. S., 14, and is not within that class, because the case at bar is one where the fine is payable—a moiety to the Government and a moiety to the

complainant, the latter not as damages—and therefore, in the case at bar, the fining judgment lacks the feature by which this Court in *Worden vs. Searles* distinguished the order from the judgment in *New Orleans vs. Steamship Co.*, and held it to be reviewable on appeal with the final decree.

The Circuit Court of Appeals is not committed to the view that the fining order in the case at bar can be reviewed with the final decree; on the contrary, it *expressly* reserves that question until it is presented, but it mentions the distinction by which *Worden vs. Searles* was distinguished from *New Orleans vs. Steamship Co.* (see Opinion, fol. 40), which distinction, if applied to the order at bar, would forbid its review on appeal from the final decree.

If the Circuit Court of Appeals has no jurisdiction to entertain petitioner's writ of error, and if the fining order or judgment is not within the class of cases considered in *Worden vs. Searles*, so that the same may be reviewed on appeal from a final decree, then the petitioner is without any remedy and cannot have any review by any Court of the fining judgment by which it is aggrieved.

The perplexity, if it be such, of the Circuit Court of Appeals, or its denial of our claim to review, if there be no perplexity, arises from what we believe to be a misunderstanding of the ruling of this Court in the *Debbs* case. But if the misunderstanding be that of counsel rather than of the Court, the question presented by the petition is important generally, as well to the petitioner, because it affects the liberty and the property of the citizen in a peculiar manner, and exposes him to be deprived of both by the *unreviewable* power of a single judge.

By Section 725, United States Revised Statutes, Circuit Courts have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their

authority." Such power extends to the disobedience by any party or other person "to any lawful writ, process, order, rule, decree, or command of said courts."

By Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (U. S. Stat. at L., Vol. 26, Chap. 517), that Court may review by appeal or by writ of error *final* decisions in the Circuit Courts "in all cases" other than those mentioned in the preceding section, which exceptions are not relevant to the present question. Therefore, it may review a judgment fining for contempt if that judgment is *final.*

A criminal contempt is a misdemeanor at common law and was punishable as such by common law courts without the aid of statutes. Section 725 makes a criminal contempt a misdemeanor by prescribing the punishment of fine or imprisonment, although it does not call it one, and a misdemeanor is a crime.

"As a general rule the grade of the offense is determined by the nature of the punishment prescribed."

People vs. Lyon, 99 N. Y., 216.

Misdemeanors include all crimes less than felonies.

This Court has repeatedly held contempt to be a crime.

In *ex parte Kearney*, 7 Wheat., 38, the petitioner moved for a *habeas corpus* to bring up the body of Kearney, then in custody under a commitment for an alleged contempt in refusing to answer certain questions. This Court held that it had no jurisdiction to issue the writ, "for when a Court commits a party for a contempt their adjudication is a conviction, and their commitment in consequence is execution" (p. 43).

In *New Orleans vs. Steamship Co.*, 20 Wall., 387, the Steamship Co. had filed a bill against the city for an injunction restraining the city's further interference with its property and for damages. The injunction was violated. The company then obtained a rule to show cause why the Mayor should not be punished for contempt. It does not appear that the rule was prosecuted to a decision, but at the *final hearing* the Court

decreed that the Mayor should pay a fine of $300 for the contempt, and that the city should be perpetually enjoined, &c., and that the company should recover damages from the city. The fine was presumably payable to the Government. Appeal was taken from the decree. In respect of that decree the Supreme Court said (p. 392):

"The fine of $300 imposed upon the Mayor is beyond our jurisdiction. Contempt of court is *a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing."

Citing, among other cases, *ex parte* Kearney.

In *Hayes vs. Fischer*, 102 U. S., 121, the suit was on a patent in which an *interlocutory injunction* was granted. The defendant, having violated it, was fined by the Court $1,389, payable to the Clerk. Hayes sued out a writ of error. The Court said that, if the fining order was to be treated as part of what was done in the original suit, it could not be reviewed in the Supreme Court by writ of error, but only on appeal from the final decree. If it was independent and separate from the original suit, it could not be reviewed by writ of error or appeal, because the Supreme Court had no jurisdiction in criminal cases, citing *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and the writ was dismissed.

In *Worden vs. Searles*, 121 U. S., 14, the suit was in equity upon a patent. A preliminary injunction had issued, for violation of which the defendant had been found guilty of contempt, and by one order directed *to pay the plaintiff* $250 as a fine, and by another order a fine of $1,182 to the Clerk, *to be paid by him to the plaintiff for damages and costs.*

Those orders came up for review with the final decree. The Supreme Court said (p. 25):

"We have jurisdiction to review the final decree in

the suit and all interlocutory decrees and orders. These fines were directed to be paid *to the plaintiff*. We say nothing as to the lawfulness or propriety of direction. But the fines were in fact *measured by the damages the plaintiff had sustained and the expenses he had incurred*. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case *differs* therefore, from that of *Ex parte Kearney*, 7 Wheat., 39."

The Court added, emphasizing the distinction,

" So, the fact in the present case, that, though the proceedings were *nominally* those of contempt, they were *really* proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans vs. Steamship Co.*"

And the orders imposing the fines were held " under " the special circumstances of this case to be review- " able by this court under the appeal from the final " decree."

In the case at bar the order or judgment imposes a fine of $1,000, $500 payable to the clerk, presumably for the use of the Government, and $500 to the complainant in the suit (see Petition, fol. 15). The former half was plainly a punishment for a crime and was not by way of damages; the other $500 was not by way of damages, at least expressly, and if not, it was an unauthorized payment to an informer.

The case at bar, therefore, seems to lack that feature which would bring it within the rule of *Worden vs. Searles*, and that exclusion would leave it within the rule of *New Orleans vs. Steamship Co.*, or perhaps half the fining judgment would be within one case, the other half within the other case.

It is, then, to be considered whether *in re Debbs*, 158 U. S., 564, abrogated the rule of *New Orleans vs. Steamship Co.*

The opinion in the *Debbs* case constrained the Circuit Court of Appeals to decline jurisdiction of petitioner's writ of error (see *Opinion*, fol. 41 *et seq.*).

The suit was in equity to restrain obstruction of interstate commerce. A preliminary injunction was granted and violated, and the violators were proceeded against as for contempt and sentenced to imprisonment. They applied to the Supreme Court for a writ of error, also for *habeas corpus*, the main ground being that the Circuit Court as a court of equity did not have jurisdiction of the bill.

But the Supreme Court held that the Circuit Court had jurisdiction of the bill on the ground "that the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt;" and the petition for *habeas corpus* was dismissed as that for writ of error had been before (159 U. S., 251).

In the opinion the Court said (p. 599):

"The proceding by injunction is of a *civil character* and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offence committed in the course of such violation;"

The contention of Debbs was that the proceeding against him in the Circuit Court was a criminal proceeding, that it was outside of the province of equity to enjoin the commission of crimes, that a Chancellor has no criminal jurisdiction. But the Attorney-General argued that the suit was a civil suit which the Circuit Court could entertain under its chancery powers. This latter view was sustained, and the language quoted above was used with reference to that theory, and to distinguish that theory from the petitioner's position.

We suppose its import is not to be extended beyond the principle which it was intended to elucidate, and the point to which that principle was applied. The opinion does not refer to *Ex parte Kearney* or *New*

Orleans vs. Steamship Co., and it is not to be assumed that this Court intended to overrule them or qualify their reasoning or conclusions.

In the "Statement of the Case" at page 573 it is said that a writ of error taken by Debbs to the Supreme Court had been denied "on the ground that the order of the Circuit Court was not a final judgment or decree."

In 159 U. S., 251, it is noted that the writ of error was dismissed, but the ground is not stated.

In *Tinsley vs. Anderson*, 171 U. S., 101–105, the *Debbs* case is mentioned in such connection as to indicate that this Court distinguishes the ruling in the *Debbs* case from that in *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and regards the latter as still applicable to independent proceedings for contempts in the Circuit Court, including fining judgments for disobedience of preliminary injunction.

The Circuit Court of Appeals for the Second Circuit does not, however, so consider it.

Conflicting Decisions in the Circuit Courts of Appeals.

In *Sessions vs. Gould*, 63 Fed. Rep., 1001 (An. 1894), an order or judgment imposing a fine for contempt in a patent case was brought up on *appeal*. The Court held that it had jurisdiction under Section 6 of the act to establish Circuit Courts of Appeal to review a criminal judgment, but could do so only upon *writ of error*.

In *Gould vs. Sessions*, 67 Fed. Rep., 163 (An. 1895) the same Court reviewed the contempt proceedings on writ of error. The Court held that the fining order "was in effect a judgment in a criminal case" on the authority of *New Orleans vs. Steamship Co.* and the Court noticed that the fine was imposed as a fine to be paid to the government and not to enure to the benefit of the plaintiff, and distinguished *Worden vs. Searles* on that point and reversed the order.

In *Nassau Electric Ry. Co. vs. Sprague R. & M. Co.*, 95 Fed. Rep., 415 (An. 1899), a writ of error to review an order imposing a fine for a violation of the preliminary injunction in a patent case was dismissed by the same Court under the authority of the *Debbs* case, the Court being "constrained to hold that the order "cannot be reviewed except upon an appeal from the "final decree in the cause." As the latter mode of review was not then before the Court, we suppose that its intimation was not binding, and, in the present case, the Court is careful not to commit itself (fol. 40).

In *Cary Mfg. Co. vs. Acme Flexible Clasp Co.*, 108 Fed. Rep., 873 (An., 1901), the same Court entertained a writ of error to review a judgment of the Circuit Court imposing a fine for violation of an injunction. The opinion does not indicate whether the injunction was interlocutory or one granted by final decree. The opinion of the same Court in the case at bar says the latter was its character, and thus explains the apparent conflict between the decision and that in *Nassau vs. Sprague* (see Opinion, fol. 37).

Finally, the same Court in the case at bar says "the hardship of compelling a party to wait until he "can appeal from a final decree to obtain a review es- "pecially in cases in which the defendant has been "committed and is suffering imprisonment, is mani- "fest; and we should be glad to be able to see our "way clear to depart from our former decision," referring to *Nassau vs Sprague*, in which it was constrained by the authority of *In re Debbs* to deny its jurisdiction of a writ of error. But, of course, it is not commited to take jurisdiction, and cannot, when the fining judgment is brought up with the final decree, unless the case is squarely within *Worden vs. Searles*, and to be so the fining order or judgment must award the fines to the plaintiff *as damages*, which the fining order in the case at bar does not do.

In re Paquet, 114 Fed. Rep., 441 (An., 1902), the Circuit Court of Appeals for the Fifth Circuit, said, as a *possibility* that a writ of error would lie, in view of

the explanation of the *Debbs* case contained in *Tinsley vs. Anderson.*

In re Nevitt, 117 Fed. Rep., 448 (An., 1902), the Circuit Court of Appeals for the Eighth Circuit explains and comments on the difference between criminal and civil contempts, and holds that fining orders made to vindicate the authority and dignity of a Court contemned by disobedience of its order is strictly of a *criminal* and *punitive* character on the authority of *New Orleans vs. Steamship Co.*

That Court, therefore, is not, like the same Court for the Second Circuit, constrained to regard such contempts to be within the ruling of the *Debbs* case, and as of a "civil character."

The state of the authorities then on this important question is substantially as follows:

Section 725 R. S. makes disobedience of a Court's order a crime by punishing it with fine or imprisonment, hence a misdemeanor.

Ex parte Kearney held contempt of Court to be a crime, and for that reason not within the appellate jurisdiction of the Supreme Court.

New Orleans vs. Steamship Co. held similarly in a purely civil case, and, in reviewing the final decree, separated the *fining* part of it from the rest of the decree, and held that, because it is criminal in character, the Court could not review it.

Worden vs. Searles reversed orders punishing for contempt along with the final decree, because although the fining orders were *nominally* criminal, the fines for contempt were *really* awards of damages to the plaintiff, as in fact on their face they were.

It would seem, therefore, that in a case like that shown in the petition where half the fine is payable to the clerk, presumably for use of the government, and the other half to the complainant, but not as damages, the order or judgment imposing the fine is not reviewable with the final decree. If it is not, it is reviewable,

if at all, only by writ of error to the Circuit Court of Appeals under Section 6 of the Act of March 3, 1891.

The Circuit Court of Appeals for the Second Circuit took that view of it in *Gould vs. Sessions*, 67 Fed. Rep., 163, on the authority of *New Orleans vs. Steamship Co.*, but in *Nassau, &c., vs. Sprague, &c.*, 95 Fed. Rep., 415, declined jurisdiction under the authority of *In re Debbs*.

In re Debbs is construed by the Circuit Court of Appeals as overruling *ex-parte Kearney* and *New Orleans vs. Steamship Co.*, although neither of those cases are referred to in the opinion.

In *Tinsley vs. Anderson* the Supreme Court explains and apparently limits *In re Debbs*, but not so explicitly as to induce the Circuit Court of Appeals in in the present case to depart from its ruling in *Nassau, &c.; vs. Sprague*, and return to that of *Gould vs. Sessions*.

In re Paquet the Fifth Circuit intimates that *possibly* a writ of error will lie, notwithstanding the *Debbs* case, in view of *Tinsley vs. Anderson*.

In re Nevitt, the Eighth Circuit holds fining orders or judgments for disobedience of orders, inflicted to vindicate the dignity of the Court, to be criminal and punitive in character, notwithstanding the ruling in the *Debbs* case.

Under the *semble* in *Re Paquet*, the Court in the Fifth Circuit would *possibly* have taken jurisdiction of a writ of error like petitioner's.

Under the rule defining criminal contempts in *Re Nevitt*, the Court in the Eighth Circuit would, we think, certainly have taken jurisdiction of such a writ of error.

But the Court in the Second Circuit refuses to do so.

In view of the explanation of *Re Debbs* contained in *Tinsley vs. Anderson*, we believe the Court of Appeals for the Second Circuit should have considered petitioner's writ of error on the merits.

It may properly be suggested that the question presented by the petition is one of the jurisdiction of the Circuit Court of Appeals, and one where that Court for the Second Circuit has entertained on successive occasions opposing views, and, finally, a view opposite to that of the Court for the Eighth Circuit, while the Court for the Fifth Circuit regards its jurisdiction as possible. Under such circumstances, the question is of general interest as well as immediate to the petitioner.

The petition is distinguishable from that of *In re* Key, 189 U. S., 84, where this Court held that a writ of mandamus could not be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction. No such circumstances are here presented.

This Court, therefore, is respectfully urged to grant the rule prayed for or such other writ under Section 716, Revised Statutes, as may be appropriate.

WM. A. JENNER,
Of Counsel for Petitioner.

Supreme Court of the United States.

IN THE MATTER OF The Petition of the CHRISTENSEN ENGINEERING COMPANY, praying for a writ of mandamus.	No. 15, Original Oct. Term, 1903.

Brief for Christensen Engineering Company to Support its Petition for Mandamus.

The matter now arises upon the return of the rule made by this Court requiring the Circuit Court of Appeals for the Second Circuit to show cause why a mandamus should not issue as prayed for in the petition.

Petition asks for a mandamus to the Circuit Court of Appeals for the Second Circuit, commanding it to reinstate petitioner's writ of error, to take jurisdiction thereof, and consider and determine the same on its merits.

The merits of said writ of error are not here for review, and the proceedings in the Court below are referred to only to show the *status* of the case, and how the question here arises.

The question arises as follows: The Christensen Engineering Co. being sued in equity for infringement of a patent, a preliminary injunction was issued enjoin-

the injunction, the Circuit Court fined the petitioner $1,000, $500 of which was ordered to be paid to the Clerk of the Court, presumably for the use of the Government, and $500 to the complainant in the suit, but not, at least expressly, by way of damages or indemnity, though it may have been so intended (Pet., par. VI.).

The petitioner sued out a writ of error to the Circuit Court of Appeals (Pet., par. VII. and VIII.). After a hearing that Court dismissed the writ, without any consideration of the merits, on the ground that it had no jurisdiction of the writ (Pet., par. IX.), and without either affirming or reversing the order or judgment of the Circuit Court (See Affit. of Counsel, fol. 30 of Petition). The opinion is annexed to the petition and discloses that lack of jurisdiction was the *sole* ground of the dismissal.

The Circuit Court of Appeals was, in its own words, " constrained " to dismiss the writ under the authority of *In re Debs*, 158 U. S., 564, although it had previously taken jurisdiction of a similar writ under the authority of *New Orleans vs. Steamship Co.*, 20 Wall., 387, and yet *In re Debs* does not purport to overrule *New Orleans vs. Steamship Co.*, nor even refers to it, and, as we think, the two cases are consistent.

We may concede that if the Circuit Court's order or judgment fining for contempt was not *final*, but intermediate, and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed. If, however, it was *final*, then the Circuit Court of Appeals should have entertained our writ of error, and that Court substantially so concedes. But under the ruling in *New Orleans vs. Steamship Co.*, as understood by the Circuit Court of Appeals in deciding cases earlier than the one at bar, and by the Supreme Court in later cases, the fining order or judgment, to review which our writ of error is taken, *is* final, because it is not within the class of cases considered in *Worden vs. Searles*, 121 U. S., 14, and is not within that class,

because the case at bar is one where the fine is payable—a moiety to the Government and a moiety to the complainant, the latter not as damages—and therefore, in the case at bar, the fining judgment lacks the feature by which this Court in *Worden vs. Searles* distinguished the order from the judgment in *New Orleans vs. Steamship Co.*, and held it to be reviewable on appeal with the final decree.

The Circuit Court of Appeals is not committed to the view that the fining order in the case at bar can be reviewed with the final decree; on the contrary, it *expressly* reserves that question until it is presented, but it mentions the distinction by which *Worden vs. Searles* was distinguished from *New Orleans vs. Steamship Co.* (see Opinion, fol. 40), which distinction, if applied to the order at bar, would forbid its review on appeal from the final decree.

If the Circuit Court of Appeals has no jurisdiction to entertain petitioner's writ of error, and if the fining order or judgment is not within the class of cases considered in *Worden vs. Searles*, so that the same may be reviewed on appeal from a final decree, then the petitioner is without any remedy and cannot have any review by any Court of the fining judgment by which it is aggrieved.

The perplexity, if it be such, of the Circuit Court of Appeals, or its denial of our claim to review, if there be no perplexity, arises from what we believe to be a misunderstanding of the ruling of this Court in the *Debs* case. But if the misunderstanding be that of counsel rather than of the Court, the question presented by the petition is important generally, as well as to the petitioner, because it affects the liberty and the property of the citizen in a peculiar manner, and exposes him to be deprived of both by the *unreviewable* power of a single judge.

I.

By Section 725, United States Revised Statutes, Circuit Courts have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." Such power extends to the disobedience by any party or other person "to any lawful writ, process, order, rule, decree, or command of said courts."

By Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (U. S. Stat. at L., Vol. 26, Chap. 517), that Court may review by appeal or by writ of error *final* decisions in the Circuit Courts "in all cases" other than those mentioned in the preceding section, which exceptions are not relevant to the present question. Therefore, it may review a judgment fining for contempt if that judgment is *final.*

A criminal contempt is a misdemeanor at common law and was punishable as such by common law courts without the aid of statutes. Section 725 makes a criminal contempt a misdemeanor by prescribing the punishment of fine or imprisonment, although it does not call it one, and a misdemeanor is a crime.

In *Re* Acker, 66 Fed. Rep., 291, a contempt proceeding is classified as a misdemeanor.

In *Accumulator Co. vs. Consolidated, &c.*, 53 Fed. Rep., 793, it was said the same rules prevail which govern in the trial of indictments.

"As a general rule the grade of the offense is determined by the nature of the punishment prescribed."

People vs. Lyon, 99 N. Y., 216.

It has been said that contempts are divisible into civil and criminal contempts; thus in *Phillips vs. Welch*, 11 Nev., 187, 190:

"If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil and he stands committed until he complies with the order. The order in such a case is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act injurious to the other party

the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone has an interest in the enforcement of the order, and the moment he is satisfied the imprisonment terminates; in the latter the state alone is interested in the enforcement of the penalty."

But in *In re Chiles*, 22 Wall, 157, 168, this Court, referring to R. S. 725 and the power of courts thereunder to punish by fine and imprisonment for contempts of their authority consisting of disobedience of of an order, etc., says;

"The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the Court or its order, and the second to compel his performance of some act or duty required of him by the Court which he refuses to perform.

"In the former case the Court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

This Court has repeatedly held contempt to be a crime.

In *ex parte Kearney*, 7 Wheat., 38, the petitioner moved for a *habeas corpus* to bring up the body of Kearney, then in custody under a commitment for an alleged contempt in refusing to answer certain questions. This Court held that it had do jurisdiction to issue the writ, "for when a Court commits a party for a contempt their adjudication is a conviction, and their commitment in consequence is execution" (p. 43).

In *New Orleans vs. Steamship Co.*, 20 Wall., 387, the Steamship Co. had filed a bill against the city for an injunction restraining the city's further interference with its property and for damages. The injunction was violated. The company then obtained a rule to show cause why the Mayor should not be punished for contempt. It does not appear that the rule was prose-

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"The fine of $300 imposed upon the Mayor is beyond our jurisdiction. Contempt of court is *a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing."

Citing, among other cases, *ex parte* Kearney.

In *Hayes vs. Fischer*, 102 U. S., 121, the suit was on a patent in which an *interlocutory injunction* was granted. The defendant, having violated it, was fined by the Court $1,389, payable to the Clerk. Hayes sued out a writ of error. The Court said that, if the fining order was to be treated as part of what was done in the original suit, it could not be reviewed in the Supreme Court by writ of error, but only on appeal from the final decree. If it was independent and separate from the original suit, it could not be reviewed by writ of error or appeal, because the Supreme Court had no jurisdiction in *criminal* cases, citing *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and the writ was dismissed.

In *Worden vs. Searles*, 121 U. S., 14, the suit was in equity upon a patent. A preliminary injunction had issued, for violation of which the defendant had been found guilty of contempt, and by one order directed *to pay the plaintiff* $250 as a fine, and by another order a fine of $1,182 to the Clerk, *to be paid by him to the plaintiff for damages and costs.*

Those orders came up for review with the final decree. The Supreme Court said (p. 25):

" We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid *to the plaintiff*. We say nothing as to the lawfulness or propriety of direction. But the fines were *in fact measured by the damages the plaintiff had sustained and the expenses he had incurred.* They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case *differs* therefore, from that of *Ex parte Kearney*, 7 Wheat., 39."

The Court added, emphasizing the distinction,

" So, the fact in the present case, that, though the proceedings were *nominally* those of contempt, they were *really* proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans vs. Steamship Co.*"

And the orders imposing the fines were held " under " the special circumstances of this case to be review- " able by this court under the appeal from the final " decree."

In the case at bar the order or judgment imposes a fine of $1,000, $500 payable to the clerk, presumably for the use of the Government, and $500 to the complainant in the suit (see Petition, fol. 15). The former half was plainly a punishment for a crime and was not by way of damages; the other $500 was not by way of damages, at least expressly, and if not, it was an unauthorized payment to an informer.

The case at bar, therefore, seems to lack that distinguishing feature which would bring it within the rule of *Worden vs. Searles*, and that exclusion would leave it within the rule of *New Orleans vs. Steamship Co.*

In *Re Swan*, 150 U. S., 637, the question arose under the So. Carolina Dispensary Act, this Court said, foot page, 652:

" Contempt of court is a specific criminal offence."

II.

It is, then, to be considered whether *in re Debs*, 158 U. S. 564, abrogated the rule of *New Orleans vs. Steamship Co.* and *Ex parte Kearney*.

The opinion in the *Debs* case constrained the Circuit Court of Appeals to decline jurisdiction of petitioner's writ of error (see *Opinion*, fol. 41 *et seq*).

The suit was in equity to restrain obstruction of interstate commerce. A preliminary injunction was granted and violated, and the violators were proceeded against as for contempt and sentenced to imprisonment. They applied to the Supreme Court for a writ of error, also for *habeas corpus*, the main ground being that the Circuit Court as a court of equity did not have jurisdiction of the bill.

But the Supreme Court held that the Circuit Court had jurisdiction of the bill on the ground " that the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt;" and the petition for *habeas corpus* was dismissed as that for writ of error had been before (159 U. S., 251).

In the opinion the Court said (p. 599):

" The proceeding by injunction is of a *civil character* and may be enforced by proceeding in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offence committed in the course of such violation;"

The contention of Debs was that the proceeding against him in the Circuit Court was a criminal proceeding, that it was outside of the province of equity to enjoin the commission of crimes, that a Chancellor has no criminal jurisdiction. But the Attorney-General argued that the suit was a civil suit which the Circuit Court could entertain under its chancery powers. This latter view was sustained, and the

language quoted above was used with reference to that theory, and to distinguish that theory from the petitioner's position.

We suppose its import is not to be extended beyond the principle which it was intended to elucidate, and the point to which that principle was applied. The opinion does not refer to *Ex parte Kearney* or *New Orleans vs. Steamship Co.*, and it is not to be assumed that this Court intended to overrule them or qualify their reasoning or conclusions.

In the "Statement of the Case" at page 573 it is said that a writ of error taken by Debs to the Supreme Court had been denied on the ground that the order of the Circuit Court was not a final judgment or decree." This statement of the ground was probably the reporter's error, and should have been that the order was not *such* a final judgment or decree as this Court could review.

In 159 U. S., 251, it is noted that the writ of error was dismissed, but the ground is not stated.

In *Tinsley vs. Anderson*, 171 U. S., 101–105, the *Debs* case is mentioned in such connection as to indicate that this Court distinguishes the ruling in the *Debs* case from that in *Ex parte Kearney* and *New Orleans vs. Steamship Co.*, and regards the latter as still applicable to independent proceedings for contempts in the Circuit Court, including fining judgments for disobedience or preliminary injunction.

The Circuit Court of Appeals for the Second Circuit does not, however, so consider it.

Conflicting Decisions in the Circuit Courts of Appeals.

In *Sessions vs. Gould*, 63 Fed. Rep., 1001 (same case, 11 C. C. A., 550) (An. 1894), an order or judgment imposing a fine for contempt in a patent case was brought up on *appeal*. The Court held that it had jurisdiction under Section 6 of the act to establish Circuit Courts of Appeal to review a criminal judg-

ment, but could do so only upon *writ of error*. Mr. Justice BROWN sat in the case.

In *Gould vs. Sessions*, 67 Fed. Rep., 163; same case 14 C. C. A., 366 (An. 1895) the same Court reviewed the contempt proceedings on writ of error. The Court held that the fining order "was in effect a judgment in a criminal case" on the authority of *New Orleans vs. Steamship Co.* and the Court noticed that the fine was imposed as a fine to be paid to the government and not to enure to the benefit of the plaintiff, and distinguished *Worden vs. Searles* on that point and reversed the order. Mr. Justice BROWN also sat in this case.

In *Nassau Electric Ry. Co. vs. Sprague R. & M. Co.*, 95 Fed. Rep., 415 (same case, 37 C. C. A., 146) (An. 1899), a writ of error to review an order imposing a fine for a violation of the preliminary injunction in a patent case was dismissed by the same Court under the authority of the *Debs* case, the Court being "con-" strained to hold that the order cannot be reviewed "except upon an appeal from the final decree in the "cause." As the latter mode of review was not then before the Court, we suppose that its intimation was not binding, and, in the present case, the Court is careful not to commit itself (fol. 40).

In *Cary Mfg. Co. vs. Acme Flexible Clasp Co.*, 108 Fed. Rep., 873 (same case, 48 C. C. A., 118) (An., 1901), the same Court entertained a writ of error to review a judgment of the Circuit Court imposing a fine for violation of an injunction. The opinion does not indicate whether the injunction was interlocutory or one granted by final decree. The opinion of the same Court in the case at bar says the latter was its character, and thus explains the apparent conflict between the decision and that in *Nassau vs. Sprague* (see Opinion, fol. 37).

Cary, &c. vs. Acme, &c., was brought into the Supreme Court by writ of error to the Circuit Court of Appeals, but the Supreme Court dismissed the writ on the grounds that the judgments and decrees of the

Circuit Court of Appeals in all cases arising under the patent laws and the criminal laws are made final by Section 6 of the Judiciary Act of March 3, 1891, and on the further ground that although the Supreme Court might have jurisdiction under Section 5 of that act, yet, the plaintiff-in-error having carried his case directly to the Circuit Court of Appeals, he must abide by the judgment of that Court (See 187 U. S., 427).

All the foregoing decisions were by the Circuit Court of Appeals for the Second Circuit.

Finally, the same Court of Appeals in the case at bar says "the hardship of compelling a party to wait "until he can appeal from a final decree to obtain a "review especially in cases in which the defendant "has been committed and is suffering imprisonment, "is manifest; and we should be glad to be able to see "our way clear to depart from our former decision," referring to *Nassau vs. Sprague*, in which it was constrained by the authority of *In re Debs* to deny its jurisdiction of a writ of error. But, of course, it is not committed to take jurisdiction, and cannot, when the fining judgment is brought up with the final decree, unless the case is squarely within *Worden vs. Searles*, and to be so the fining order or judgment must award the fines to the plaintiff *as damages*, which the fining order in the case at bar does not do.

In *Re Paquet*, 114 Fed. Rep., 441 (same case, 52 C. C. A., 239) (An., 1902), the Circuit Court of Appeals for the Fifth Circuit, said, as a *possibility* that a writ of error would lie, in view of the explanation of the *Debs* case contained in *Tinsley vs. Anderson*.

In *Re Nevitt*, 117 Fed. Rep., 448 (same case, 54 C. C. A., 622) (An., 1902), the Circuit Court of Appeals for the Eighth Circuit explains and comments on the difference between criminal and civil contempts, and holds that fining orders made to vindicate the authority and dignity of a Court contemned by disobedience of its order is strictly of a *criminal* and *punitive* character on the authority of *New Orleans vs. Steamship Co.*

That Court, therefore, is not, like the same Court for

the Second Circuit, constrained to regard such contempts to be within the ruling of the *Debs* case, and as of a "civil character."

Since the petition at bar was filed, the Circuit Court of Appeals for the Sixth Circuit, in *Bullock Electric Mfg. Co. vs. Westinghouse Electric Mfg. Co.*, has taken jurisdiction of a writ of error to review an order or judgment of a Circuit Court fining defendant for violation of a *preliminary* injunction in a patent case, and *reversed* the order or judgment. The opinion ~~states~~ shows that the defendant in error brought to the attention of the Court the opinion of the Court of Appeals for the Second Circuit rendered in the case at bar, but the Court of Appeals for the Sixth Circuit refused to follow it, being of opinion that there was nothing in the *Debs* case, properly understood, to change the rule as it had theretofore existed.

The question arose on a motion to dismiss the writ of error.

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported.

Therefore we quote from a manuscript copy of the opinion (by Judge LURTON) all that is said on the subject, as follows, and make the same a part of our argument:

"I. The willful violation of an injunction by a party "to the cause is a contempt of court constituting a "specific criminal offense. *Ex parte Kearney*, 7 "Wheat., 37, 42; *Crosby case*, 3 Wilson, 188; *New "Orleans v. Steamship Co.*, 20 Wall., 387, 392; *Hays "v. Fischer*, 102 U. S., 121; 4 *Ency. Pl. & Pr.*, 766 "*et seq.*

"It is immaterial to consider the distinction some- "times noticed between criminal and civil contempts "inasmuch as both kinds involve the vindication of "the authority of the court whether the remedy in- "cidentally inure to the benefit of a party or not. "*Cyclo. Law & Proc.*, 6 *et seq.*

"The proceeding to punish for a contempt is in its "nature a criminal proceeding whether the result be "partially remediable or not, and the same rules "prevail which govern in the trial of indictments, the

" defendant being entitled to the benefit of any reason-
" able doubt. *Accumulator Co. v. Consolidated Electric*
" *Co.*, 53 F. R., 793; *In re Acker*, 66 F. R., 291; *Har-*
" *well v. State*, 10 Lea (Tenn.), 544; 4 *Ency. Pl. & Pr.*,
" 768 *et seq.*; *U. S. v. Jose*, 63 F. R., 951.

" Although the contempt consists in the violation of
" an injunction granted by a court of equity, the pro-
" ceeding for its punishment 'is a new and distinct
" proceeding and is quite independent of the equities
" of the case on which the decree is founded'; and 'an
" appeal is not an appropriate remedy for obtaining a
" review.' *City of Frankfort v. Deposit Bank of*
" *Frankfort*, decided at February session of this court
" and not yet reported; *New Orleans v. Steamship Co.*,
" 20 Wall., 387, 392; *In re Chetwood*, 165 U. S., 443.

" Is it reviewable by a writ of error?

" A contempt proceeding is classified as a mis-
" demeanor and not as a felony. *In re Acker*, 66
" F. R., 821.

" Misdemeanors are reviewable by this court upon
" writ of error by virtue of the broad appellate powers
" conferred by the Act of March 3, 1891, establishing
" Circuit Court of Appeal, and defining and regulating
" the appellate powers of United States Courts.

" If, therefore, the imposition of the fine complained
" of 'was a judgment in a criminal case' as it is
" defined to be in *New Orleans v. Steamship Co.* 20
" Wall., 387, 392, it was a judgment in a misdemeanor
" case, for contempts are universally classified as mis-
" demeanors and not felonies. *In re Acker*, 66 F.
" R. 291.

" If a judgment in a misdemeanor case, it is re-
" viewable upon writ of error by this court.

" This conclusion was reached by the Circuit Court
" of Appeals for the Second Circuit in *Gould v.*
" *Sessions*, 67 F. R., 163. But in *Nassau Electric R.*
" *Co. v. Sprague Electric Co.*, 95 F. R., 415, and
" *Christensen Engineering Co. v. Westinghouse Air*
" *Brake Company*, decided Feb. 15, 1904, and not yet
" reported, writs of error were dismissed upon the
" authority of *In re Debs*, 158 U. S., 564, 573.

" In the statement of the Debs case at page 573, it
" is stated that the defendants in that case 'applied
" 'to this court for a writ of error and also one of
" 'habeas corpus. The former was denied on the
" 'ground that the order of the Circuit Court was not
' 'a final judgment or decree.'

" The only report of the decision on the writ of

" error is found in 159 U. S., 251, number 10, where " the statement is, 'Petition denied.'

" The Supreme Court had no jurisdiction in respect " of writs of error in misdemeanor cases and the writ " of error upon this ground was necessarily denied.

" The reporters' statement that it was denied be- " cause the order 'was not a final judgment or decree' " is doubtless an error. Certainly we do not feel " justified in departing from the well settled doctrine " so often enunciated in former cases, in respect to " the distinctness of a judgment imposing a fine for " contempt from the case in which the disobeyed " order was made, upon so slender an authority.

" If the judgment, as in this case, was in fact " unconditional and absolute, so that nothing remained " but to execute it, it was in every sense a final judg- " ment.

" The claim that a defendant in such circumstances " must await the final result of the cause in which the " injunction was granted before he can have the judg- " ment inflicting fine or imprisonment reviewed upon " the theory, that the judgment is not final is abso- " lutely unsupportable.

" If it be an independent and distinct proceeding " from the residue of the case it will be no more final " after that case has reached a final decree than when " the fine was imposed. To say that he may pay his " fine or endure his imprisonment and review the " legality of the matter at some indefinite time in the " future is to deny, in effect, the right of review at all.

" The motion to dismiss the writ is denied."

There appears, therefore, to have been two contradictory decisions of precisely the same question by Circuit Courts of Appeal in different circuits.

In the *Bullock* case the whole fine was made payable to the Clerk of the Court, while in the case at bar only one half of the fine is so payable, the other half to the complainant, but not as damages.

The state of the authorities then on this important question is substantially as follows:

Section 725 R. S. makes disobedience of a Court's order a crime by punishing it with fine or imprisonment, hence a misdemeanor.

Ex parte Kearney held contempt of Court to be a crime, and for that reason not within the appellate jurisdiction of the Supreme Court.

New Orleans vs. Steamship Co. held similarly in a purely civil case, and, in reviewing the final decree, separated the *fining* part of it from the rest of the decree, and held that, because it is criminal in character, the Court could not review it.

Re Swan (150 U. S., *supra*), held similarly.

Worden vs. Searles reversed orders punishing for contempt along with the final decree, because, although the fining orders were *nominally* criminal, the fines for contempt were *really* awards of damages to the plaintiff, as in fact on their face they were.

It would seem, therefore, that in a case like that shown in the petition where half the fine is payable to the clerk, presumably for use of the government, and the other half to the complainant, but *not* as damages, the order or judgment imposing the fine is not reviewable with the final decree. If it is not, it is reviewable if at all, only by writ of error to the Circuit Court of Appeals under Section 6 of the Act of March 3, 1891.

The Circuit Court of Appeals for the Second Circuit took that view of it in *Gould vs. Sessions*, 67 Fed. Rep., 163, on the authority of *New Orleans vs. Steamship Co.*, but in *Nassau, &c., vs. Sprague, &c.*, 95 Fed. Rep., 415, declined jurisdiction under the authority of *In re Debs.*

In re Debs is construed by the Circuit Court of Appeals, Second Circuit, as overruling *ex-parte Kearney* and *New Orleans vs. Steamship Co.*, although neither of those cases are referred to in the opinion.

In *Tinsley vs. Anderson* the Supreme Court explains and apparently limits *In re Debs*, but not so explicitly as to induce the Circuit Court of Appeals in the present case to depart from its ruling in *Nassau, &c., vs. Sprague*, and return to that of *Gould vs. Sessions.*

In *Re Paquet* the Fifth Circuit intimates that *possibly* a writ of error will lie, notwithstanding the *Debs* case, in view of *Tinsley vs. Anderson.*

In *Re Nevitt*, the Eighth Circuit holds fining orders or judgments for disobedience of orders, inflicted to vindicate the dignity of the Court, to be criminal and punitive in character, notwithstanding the ruling in the *Debs* case.

Under the *semble* in *Re Paquet*, the Court in the Fifth Circuit would *possibly* have taken jurisdiction of a writ of error like petitioner's.

Under the rule defining criminal contempts in *Re Nevitt*, the Court in the Eighth Circuit would we think, certainly have taken jurisdiction of such a writ of error.

In *Bullock vs Westinghouse* (not reported) the Court for the Sixth Circuit takes jurisdiction of a writ of error and *reverses* the judgment.

But the Second Circuit declines jurisdiction.

In view of the explanation of *Re Debs* contained in *Tinsley vs. Anderson*, we believe the Court of Appeals for the Second Circuit should have taken jurisdiction and considered petitioner's writ of error on the merits.

It may properly be suggested that the question presented by the petition is one of the jurisdiction of the Circuit Court of Appeals, and one where that Court for the Second Circuit has entertained on successive occasions opposing views, and, finally, a view opposite to that of the Court for the Eighth Circuit, and the Sixth Circuit, while the Court for the Fifth Circuit regards its jurisdiction as possible. Under such circumstances, the question is of general interest as well as immediate to the petitioner.

Section 725 places no limit, except discretion, upon the *amount* of the fine or the *duration* of the imprisonment. Plainly, the guilt of the accused and the soundness of the discretion exercised in the punishment *should be* reviewable, and we think Section 6 of Act of March 3, 1891, makes them so.

The petition is distinguishable from that of *In re* Key, 189 U. S., 84, where this Court held that a writ of mandamus could not be used to perform the office of an appeal or writ of error, and does not lie to review

a final judgment or decree sustaining a plea to the jurisdiction. No such circumstances are here presented.

This Court, therefore, is respectfully urged to grant the writ of mandamus prayed for or such other writ under Section 716, Revised Statutes, as may be appropriate.

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